RECENT CASES

BANKRUPTCY—PROPERTY PASSING TO THE TRUSTEE IN BANKRUPTCY—TESTAMENTARY TRUSTEE'S "RIGHT" TO COMPENSATION BEFORE ALLOWANCE—A voluntary bankrupt was for fifteen years prior to adjudication, and still is, a testamentary trustee of a million dollar estate, but has never filed a compensation claim for services rendered. The trustee in bankruptcy—under that section of the Bankruptcy Act vesting him, as of the date of adjudication, with title to that non-exempt property of the bankrupt which was either transferable or subject to lawful levy and execution prior to filing of the petition [1]—sought an order compelling bankrupt (1) to request allowance of commissions and (2) to turn over that portion thereof earned prior to bankruptcy. *Held*, that by local law a testamentary trustee's right to compensation before allowance is inchoate and not property passing to petitioner under the Bankruptcy Act. In re *Furness*, 7 F. Supp. 844 (E. D. N. Y. 1934).

While the federal statute provides in general terms that property of the bankrupt capable of alienation prior to filing of the petition passes to his trustee, local law is conclusive not only as to whether a particular interest of the bankrupt constitutes a property right, but also as to the possibility of levying upon or transferring a definitely determined property right.[2] In view of this, the result in the instant case would seem legally unimpeachable, since New York allows commissions as a matter of right to accounting testamentary trustees only.[3] And while it is possible to apply for a tentative allowance prior to final closing of the estate, the granting of the application, as well as the amount of the allowance rests wholly in the discretion of the court.[4] To construe such a possibility of recompense as falling within the meaning of "property" under the Bankruptcy Act would do violence to the limitations the law has attached to the word. But even if the court, in an effort to reach another result, had defined the concept in its loose and popular sense, the eventual conclusion would almost certainly have remained unchanged. Local precedent had determined that a fiduciary's right to compensation, whether deemed "vested" or not, until

1. "The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. . . ." Bankruptcy Act, § 70a (5), 30 STAT. 544, 565 (1898), 11 U. S. C. A. § 110a (1927).

2. Robertson v. Howard, 229 U. S. 254 (1913); *In re* Butterwick, 131 Fed. 371 (M. D. Pa. 1904); *In re* Berry, 247 Fed. 700 (E. D. Mich. 1917).

3. Matter of Worthington, 141 N. Y. 9, 35 N. E. 929 (1894); Matter of Barker, 230 N. Y. 364, 130 N. E. 579 (1921).

4. Matter of Bushe, 227 N. Y. 85, 124 N. E. 154 (1919). See Matter of Miller, 231 App. Div. 684, 686, 248 N. Y. Supp. 593, 595 (4th Dep't 1931). See also SURROGATE'S COURT ACT § 285, N. Y. CIV. PRACTICE (Cahill, 1931) 825. An interesting discussion of the nature of the analogous right of a receiver to compensation is to be found in the case of *In re* Brown, 4 F. (2d) 806 (C. C. A. 2d, 1924) wherein the court declared: "When a receiver performs services in connection with his trust, it is expected that he will be compensated therefor. The amount of allowance, of course, rests in sound judicial discretion. . . . There was at least a possibility of payment for the services rendered up to the time of the petition in bankruptcy, and therefore an expectancy of an interest in the sum of money subsequently paid; that is a possibility coupled with an interest." But Fischer v. Liberty Nat. Bank & Trust Co., 61 F. (2d) 757, 759 (C. C. A. 2d, 1932) discussing *In re* Brown, states: ". . . all that we supposed we were deciding in that case was that the earned pay of a receiver might be assigned. To this we agree, but in so far as the decision held that a receiver earns any part of his final allowance until he has distributed the estate, it now appears to us to have been an inadvertence."

ascertained and liquidated at the times and in the manner authorized by law, was unassignable on grounds of public policy.[5] Despite the logical legal inevitability of the result, however, the startling conjunction of facts—a very large estate, a voluntary petition in bankruptcy, long service without application for compensation, and continuance of service after adjudication[6]—drives home the conviction that, as a purely practical matter, denial of the order unduly prejudiced the rights of creditors.[7] The court impliedly recognized this by its probably futile suggestion that perhaps the bankrupt would not object to applying for an allowance on account and thereafter voluntarily turning it over to the trustee in bankruptcy. The fact that such an answer was the only possible legal solution to the problem furnishes merely another illustration of the substantive inadequacies of our bankruptcy law.

CONFLICT OF LAWS—COURTS—APPLICATION OF THE DOCTRINE OF *Swift v. Tyson* TO A DECISION OF A STATE COURT CONSTRUING A LIFE INSURANCE POLICY—Defendant delivered a life insurance policy to the insured in Virginia. Defendant agreed to pay the insured a monthly income and to waive further premium payments upon receipt of proof from the insured that he had become totally and permanently disabled while the policy was still in force. A few days before the date on which a quarterly premium was due, the insured became physically and mentally disabled. Because of his incapacity he was unable to notify defendant and to pay the quarterly premium. Defendant claimed that the policy lapsed because of this failure. The insured's administrator brought suit in a federal district court in Virginia. *Held,* that since no "general principle of the law of contracts of insurance" was involved, the Court would apply the Virginia[1] rather than the "general or commercial law," and the plaintiff could recover. *Mutual Life Insurance Co. v. Johnson,* 55 Sup. Ct. 154 (1934).

Although the Federal Judiciary Act[2] provides that "the *laws* of the several states . . . shall be regarded as rules of decision . . . in the courts of the United States", under the doctrine of *Swift v. Tyson*[3] the federal courts have refused to follow decisions of the state courts in controversies involving "commercial" or "general" law.[4] Questions involving the law of insurance have previously been determined in the federal courts by principles of this commercial or general law.[5] Since the state courts are divided concerning the

5. Matter of Worthington, 141 N. Y. 9, 35 N. E. 929 (1894).

6. Mere insolvency of a trustee in the absence of statute is generally insufficient ground for his removal. The New York Legislature has established certain definite grounds on which a testamentary trustee may be removed. See SURROGATE'S COURT ACT § 99, N. Y. CIV. PRACTICE (Cahill, 1931) 740. *Cf.* Matter of Jung, 205 App. Div. 37, 199 N. Y. Supp. 122 (1st Dep't 1923); Matter of Berri, 130 Misc. 527, 224 N. Y. Supp. 466 (Surr. Ct. 1927); Matter of Clark, 136 Misc. 459, 241 N. Y. Supp. 520 (Surr. Ct. 1930).

7. The importance of continuance of service by an insolvent testamentary trustee lies in the assurance it furnishes of careful scrutiny of past transactions by the other trustees. It is thus a fairly strong practical indication that compensation will eventually be awarded for past services.

1. The highest court of Virginia has held that compliance with such a provision was excused under the present circumstances. Swann v. Atlantic Life Insurance Co., 156 Va. 852, 159 S. E. 192 (1931).

2. 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1928).

3. See 16 Pet. 1, 18-19 (U. S. 1842).

4. See *ibid.;* Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368, 371 (1893); Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360 (1910); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 529-530 (1928).

5. See Carpenter v. Providence Wash. Ins. Co., 16 Pet. 495, 511 (U. S. 1842); Von Moschzisker, *The Common Law and Our Federal Jurisprudence* (1926) 74 U. OF PA. L. REV. 109, 270, 367, at 287.

effect of a provision similar to the one in question,[6] it might be said that no rule of construction has crystallized into a principle of general or commercial law which the federal courts will apply regardless of the state decisions.[7] Therefore, as in previous cases, and as the Court indicated in the instant case, it may have been persuaded to follow the Virginia rule "for the sake of harmony and to avoid confusion, . . . [since] the question seems . . . balanced with doubt." [8] But although the question may involve "the construction of a highly specialized condition" in an insurance policy, the mass of cases from numerous states cited by the Court would of themselves indicate that the problem was one of considerable commercial importance. Therefore, since the chief justification for the rule of *Swift v. Tyson* has been the promotion of uniformity of decision in at least the federal courts in the field of commercial law,[9] the rule would seem to be particularly applicable to the instant case. Moreover, there was apparently already in existence a rule of general or commercial law applicable to the present situation, since the Supreme Court and a lower federal court have only lately held that compliance with an identical provision was a condition precedent to recovery on the policy.[10] The decision of the Supreme Court in the instant case, therefore, seems to be significant in further illustrating a recent reluctance [11] to follow the doctrine of *Swift v. Tyson*.[12]

CONSTITUTIONAL LAW—ADMIRALTY JURISDICTION—CONSTITUTIONALITY OF THE SHIP MORTGAGE ACT OF 1920—In accordance with the terms of the Ship Mortgage Act of 1920,[1] which provided for the creation of preferred mortgages [2] enforceable in a proceeding *in rem* in admiralty,[3] mortgages were

6. Cases collected in Note (1930) 68 A. L. R. 1389. See RESTATEMENT, CONTRACTS (1932) § 301.

7. See Fordson Coal Co. v. Kentucky River Coal Corp., 69 F. (2d) 131, 132 (C. C. A. 6th, 1934); *cf.* Commercial Electric Supply Co. v. Greshner, 59 F. (2d) 512, 514 (C. C. A. 6th, 1932).

8. See Burgess v. Seligman, 107 U. S. 20, 34 (1883); Sim v. Edenborn, 242 U. S. 131, 135 (1916); Trainor Co. v. Aetna Casualty & Surety Co., 290 U. S. 47, 54 (1933); Community Building Co. v. Maryland Casualty Co., 8 F. (2d) 678, 680 (C. C. A. 9th, 1925), *cert. denied* 270 U. S. 652 (1926).

9. See Von Moschzisker, *supra* note 5, at 285; (1934) 82 U. OF PA. L. REV. 647; *cf.* Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 528.

10. Bergholm v. Peoria Life Ins. Co., 284 U. S. 489 (1932); Egan v. New York Life Ins. Co., 60 F. (2d) 268 (N. D. Ga. 1932), *aff'd*, 67 F. (2d) 899 (C. C. A. 5th, 1933).

11. See Trainor Co. v. Aetna Casualty & Surety Co., 290 U. S. 47, 55 (1933); *cf.* Burns Mortgage Co. v. Fried, 292 U. S. 487, 495 (1934), (1934) 83 U. OF PA. L. REV. 83.

12. In this connection the Court in the instant case (at 158) made this comment: "The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity."

1. 41 STAT. 1000-1006 (1920), 46 U. S. C. A. 911-984 (1926).

2. Prior to the Act, ship mortgages were of little value as security since they were inferior to all maritime liens. The J. E. Rumbell, 148 U. S. 1 (1893). In order to encourage investment in the merchant marine, the Act established a preference in ship mortgage liens as against all other maritime liens except those existing prior to the mortgage or arising out of tort and liens for salvage, general average or wages. By the standard marine insurance policy, together with a protection and indemnity clause, the mortgagee can protect his preference against practically all liens except those for wages. Miller, *The Foreclosure of Vessel Mortgages in Admiralty* (1921) 70 U. OF PA. L. REV. 22, 23.

3. Original jurisdiction of suits involving preferred mortgages is granted to the federal district courts exclusively. 41 STAT. 1003 (1920), 46 U. S. C. A. 951 (1926). The tribunal formerly resorted to for the foreclosure of ship mortgages was equity. Bogart v. The John Jay, 17 How. 399 (U. S. 1854). Where a mortgage debt was contracted for services rendered to the ship, a maritime lien enforceable in the admiralty would exist independently of the

executed on two vessels. Both mortgagor and mortgagee knew that the money advanced was to be used for nonmaritime purposes. On default, suit to foreclose was brought in admiralty by the mortgagee and was resisted on the ground that the foreclosure of mortgages not related to maritime purposes was not within the constitutional jurisdiction of admiralty. *Held,* that the Act was constitutional as a valid exercise of the Congressional power to legislate in cases of admiralty and maritime jurisdiction. *Detroit Trust Co. v. The Thomas Barlum,* 55 Sup. Ct. 31 (1934), *rev'g* 68 F. (2d) 946 (C. C. A. 2d, 1934).

Although Congress has constitutional authority to legislate upon subject matters within admiralty and maritime jurisdiction,[4] the historical limitations upon that jurisdiction have generally confined the cases treated in admiralty to those relating to ships in their actual use as instruments of navigation or to matters which in a direct way form a part of maritime commerce.[5] On the theory that ship mortgages do not constitute maritime contracts—since analogously to contracts for the sale [6] or construction [7] of vessels they concern maritime activity only ultimately [8]—the usual assumption, prior to the Act, was that they were not within the cognizance of admiralty courts.[9] Particularly has the mortgage been considered of remote maritime incidence where, as in the instant case, there was no restriction against the application of the proceeds to nonmaritime purposes.[10] While a similar restriction was held to be immaterial in the case of bottomry bonds and *respondentia* loans,[11] admiralty accepted jurisdiction there since the obligee of these instruments directly participated in maritime activity by conditioning repayment of the loan upon the successful outcome of the voyage.[12] The decision of the Circuit Court of Appeals that the Act was intended to apply in only those cases in which the proceeds of the mortgage were appropriated to maritime purposes—a conclusion not merited from its terms—represents an attempt to uphold its constitutionality, while at the same

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execution of the mortgage. The Hilarity, Fed. Cas. No. 6,480, at 142 (S. D. N. Y. 1829); The Hunter, Fed. Cas. No. 6,904, at 951 (D. Me. 1833). A forum capable of extinguishing other maritime liens, and thereby creating a mortgage preference, combined with the need for a simple, expeditious and uniform proceeding, make foreclosure in federal admiralty courts advisable. Miller, *supra* note 2, at 24.

4. The Constitution delegates to Congress the power to make all laws which shall be "necessary and proper" under the provision extending the judicial power "to all cases of admiralty and maritime jurisdiction". U. S. CONST., Art. I, § 8 (18); Art. III, § 2.

5. The most explicit statements by the Supreme Court of subject matters within the jurisdiction of admiralty are to be found in Insurance Co. v. Dunham, 11 Wall. 1, 26 (U. S. 1870), and Thames Towboat Co. v. The Francis McDonald, 254 U. S. 242, 244 (1920). Other definitions are to be found in 1 BENEDICT, ADMIRALTY (5th ed. 1925) § 63; HUGHES, ADMIRALTY (2d ed. 1920) 18.

6. The Ada, 250 Fed. 194 (C. C. A. 2d, 1918).

7. People's Ferry Co. v. Beers, 20 How. 393 (U. S. 1857); Thames Towboat Co. v. The Francis McDonald, 254 U. S. 242 (1920).

8. For a criticism of the narrowness of this view see 1 BENEDICT, ADMIRALTY (5th ed. 1925) §§ 68, 69. See also 1 VALIN, COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE DU MOIS D'AOUT 1681 (2d ed. 1840) 112, 151; Morrison, *The Constitutionality of the Ship Mortgage Act of 1920* (1934) 44 YALE L. J. 1, 17 *et seq.*

9. This view has been taken on the doubtful authority of Bogart v. The John Jay, 17 How. 399 (U. S. 1854). There is language to the same effect in The Neptune, 3 Hag. Ad. 129, 132 (Eng. 1834). Neither case represents more than uncontrolling *dictum.* The Nanking, 292 Fed. 642 (N. D. Cal. 1923).

10. See the opinion of the Circuit Court of Appeals in the principal case.

11. Bottomry bonds: The Draco, Fed. Cas. No. 4,057, at 1032 (D. Mass. 1835); The Mary, Fed. Cas. No. 9,187, at 938 (D. Conn. 1824); 3 KENT, COMM. (14th ed. 1896) 361-362. *Contra:* Knight v. The Attila, Fed. Cas. No. 7,881, at 755 (E. D. Pa. 1838). *Respondentia* loans: Conard v. Atlantic Ins. Co., 1 Pet. 386 (U. S. 1828); PARK, MARINE INSURANCE (3d Am. ed. 1800) 410.

12. For the nature of bottomry bonds and *respondentia* loans, see 1 PARSONS, SHIPPING AND ADMIRALTY (1869) 132, 165.

time preserving the traditional American concept of admiralty jurisdiction.[13] The progressive attitude of the Supreme Court, however, has refused complacent abidance by useless strictures of historical dictation. In conformity with the "general maritime law" recognized in other countries,[14] the Court disregarded the ends to which mortgage moneys are appropriated, and considered of sufficient maritime concern, for jurisdictional purposes, the greater interest that the free hypothecation of ships will attract capital to the merchant marine by assuring investors of a preferred status. In so doing it has established a precedent wisely reserving to it a power to qualify or supplement the nature of maritime law which is as elastic as its definition of cases justiciable under the "due process" or "interstate commerce" clauses.[15]

CONSTITUTIONAL LAW—LEGISLATIVE POWERS AND DELEGATION THEREOF —VALIDITY OF SECTION 9 (c) OF NATIONAL INDUSTRIAL RECOVERY ACT— Plaintiffs sought an injunction to restrain defendants, federal officers, from enforcing executive orders based on the authority granted by § 9 (c) of the National Industrial Recovery Act, which authorizes the President to prohibit the interstate transportation of oil produced or withdrawn from storage in violation of any state law or regulation on the subject.[1] *Held*,[2] that since the policy declared in § 1 of the Act is not sufficiently definite to provide a standard for the execution of the President's authority,[3] § 9 (c) is invalid as an illegal delegation of legislative power. *Panama Refining Co. v. Ryan*, 55 Sup. Ct. 241 (1935).

The doctrine that Congress may not delegate legislative power to administrative or executive officers has long been regarded as a platitude of constitutional law. In spite of sporadic criticisms [4] and analyses [5] it has survived at least in juridical language. Although a certain amount of delegation has in

13. The Act in no way suggests any requirement as to the use of the moneys borrowed upon the ship mortgage, and its purpose would have been frustrated if it were made incumbent upon investors to discover at their peril whether the capital advanced was devoted to maritime uses. The preferred status was intended to arise immediately, and without more, upon the recording of the mortgage and its endorsement upon the ship's documents. It is conceivable that in many cases the mortgagor would be unable to procure a loan unless he applied at least part of it to extinguish a pre-existing debt owing to the mortgagee. (1933) 43 YALE L. J. 1172.

14. In so doing, the Court re-established the liberal standard asserted by Mr. Justice Story, in DeLovio v. Boit, Fed. Cas. No. 3,776, at 443 (D. Mass. 1815), of following general maritime law in determining the scope of admiralty jurisdiction and not the limits of admiralty in England at the time of the adoption of the Constitution. Most European countries have provisions for dealing with mortgages in the admiralty, CONSTANT, THE LAW RELATING TO THE MORTGAGE OF SHIPS (1920) Appendix A, 113, and appropriate legislation to this end has long existed in England. 3 & 4 VICT. c. 65 (1840); 24 & 25 VICT. c. 10 (1861).

15. The need for such a definition may arise under other sections of this same Act as yet not called into question. For an excellent discussion, *inter alia*, of the constitutionality of subsection N of the Act, which permits the mortgagee to bring suit *in personam* in admiralty against the mortgagor for the mortgage indebtedness or any deficiency, see Morrison, *The Constitutionality of the Ship Mortgage Act of 1920* (1934) 44 YALE L. J. 1, 25.

1. 48 STAT. 195, 200, 15 U. S. C. A. § 709 (c) (Supp. 1934).

2. Mr. Justice Cardozo dissenting.

3. 48 STAT. 195, 15 U. S. C. A. § 701 (Supp. 1934). The policy contained in § 1 of the Act is declared to be, *inter alia* "to remove obstructions to the free flow of interstate and foreign commerce", "to eliminate unfair competitive practices", "to avoid undue restriction of production (except as may be temporarily required)" and "to conserve natural resources".

4. Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892, 921; Duff and Whiteside, *Delegata Potestas non Potest Delegari* (1929) 14 CORN. L. Q. 168, 195; Handler, *The National Industrial Recovery Act* (1933) 19 A. B. A. J. 440, 446.

5. Note (1933) 47 HARV. L. REV. 85, 93-95.

fact always been allowed,[6] and the quantity deemed innocuous has, due to economic conditions, sometimes been very great,[7] it was ostensibly never doubted that a limit did, in the abstract, exist. The instant case, however, appears to be the first definitive statement by the Supreme Court [8] holding that a Congressional enactment exceeds the permissible bounds of this judicially-imposed [9] restriction. While requiring a "primary standard",[10] "declared policy",[11] or "intelligible principle",[12] promulgations the most indefinite have been held sufficient guides for executive or administrative discretion.[13] Some of these, as has been observed, are no less vague than the criteria set forth in the NIRA.[14] In any event, the prevailing and dissenting views in the instant case, although reaching diametrical results, may be said to spring from and proceed along an identical theory, *viz.*, that "Congress may confer quasi-legislative power upon an administrative agency if it has established as far as is practicable the primary purpose of the legislation, and has demarcated the limits of the power delegated as fully as the circumstances permit".[15] The majority concluded that, the grant being absolute and the concomitant standard quite broad, delegation here is tantamount to abdication; [16] the minority argued that the whole is reasonable, at any rate under present circumstances.[17] Since this is merely difference of opinion on a (theoretically) narrow issue—the existence of a workable standard —it seems inadvisable, if not impossible, dogmatically to stamp one outcome correct and the other erroneous. On the other hand, the result actually attained impedes gratuitously the administration and enforcement of the NIRA; more-

6. See Wayman v. Southard, 10 Wheat. 1, 43, 46 (U. S. 1825) per Mr. Chief Justice Marshall; Parkinson, *The New Tariff Act and Delegations of Legislative Power* (1923) 9 A. B. A. J. 177.

7. See Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 305 (1933).

8. See Black, *The National Industrial Recovery Act and the Delegation of Legislative Power to the President* (1934) 19 CORN. L. Q. 389, 392; Carpenter, *Constitutionality of the NIRA and the AAA* (1934) 7 So. CALIF. L. REV. 125, 126; Note (1934) 82 U. OF PA. L. REV. 739, 743.

9. "No rule . . . prevents the delegation . . . through general statutes of the power and duty to perform functions legislative in their nature." Cheadle, *loc. cit. supra* note 4. The restrictive principle is generally regarded as incident to the "separation of powers" theory of the Constitution. See U. S. CONST. Art. I, § 1; Hampton & Co. v. United States, 276 U. S. 394, 406, 407 (1928).

10. See Buttfield v. Stranahan, 192 U. S. 470, 496 (1904).

11. See Mahler v. Eby, 264 U. S. 32, 40 (1924).

12. See Hampton & Co. v. United States, 276 U. S. 394, 409 (1928).

13. Martin v. Mott, 12 Wheat. 19 (U. S. 1827) ("such number of the militia . . . as he may judge necessary"); Field v. Clark, 143 U. S. 649 (1892) ("reciprocally unequal and unreasonable", "suspend . . . for such time as he shall deem just"); Buttfield v. Stranahan, 192 U. S. 470 (1904) ("establish uniform standards of purity, quality and fitness"); Union Bridge Co. v. United States, 204 U. S. 364 (1907) ("unreasonable obstruction of navigation"); United States v. Grimaud, 220 U. S. 506 (1911) ("such rules . . . as will insure the objects of such reservation"); Avent v. United States, 266 U. S. 127 (1924) ("interest of the public"); United States v. Chemical Foundation, Inc., 272 U. S. 1 (1926) ("in the public interest"); Radio Comm. v. Nelson Bros. Co., 289 U. S. 266 (1933) ("public convenience, interest or necessity"). In Avent v. United States, *supra*, it was said by Mr. Justice Holmes, at 130: ". . . the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed."

14. Dickinson, *The Major Issues Presented by the Industrial Recovery Act* (1933) 33 COL. L. REV. 1095, 1100. For the opposite viewpoint see Maurer, *Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act* (1934) 22 GEO. L. J. 207, 227.

15. Note (1933) 47 HARV. L. REV. 85, 94.

16. Principal case at 248.

17. Principal case at 257, Mr. Justice Cardozo, dissenting.

over, it creates a more or less rigid rubric from a hitherto infinitely extensible principle. If practical effects, both immediate and ultimate, be considered, the dissent would appear to embody an attitude at once more realistic and more prescient.

CONSTITUTIONAL LAW—MINIMUM PRICE LEGISLATION—VALIDITY OF STATUTE FIXING HIGHER MINIMUM SALE PRICE FOR WELL-ADVERTISED BRANDS THAN FOR THOSE UNADVERTISED—The New York Milk Control Act[1] provided that the minimum sale price for well-advertised brands of milk should be one cent higher than for unadvertised brands. The Milk Control Board ruled that the Act should apply to four dealers, one of which was the Borden Company, which filed a bill to enjoin its enforcement on the ground that it discriminated unreasonably against dealers in well-advertised brands. The district court sustained a demurrer to the bill.[2] On appeal to the Supreme Court, *held,* that the case be remanded and that complainant should be permitted to prove that no such differential in milk prices existed prior to the statute. *Borden's Farm Products Co. v. Baldwin,* 55 Sup. Ct. 187 (1934).

Although the Court purported not to pass finally upon the merits of the case, it distinctly intimated that the statute is unconstitutional unless such a differential can be proved to have existed prior to the statute. The district court, in upholding the statute, took the much broader view that the statutory price differential was not unreasonable, because it was necessary to prevent well-advertised dealers from matching prices with "independents" and thus forcing the latter out of economic existence.[3] However, even if no price differential existed before the price fixing enactment, it does not necessarily follow that the economic welfare of the "independents" did not require one; for the non-existence of the differential would, in all probability, have been caused by attempts of well-advertised dealers to match prices with "independents" for the very purpose of destroying them. There still remains, therefore, the question whether a legislature should be permitted to fortify certain members of a mutually competing group in order to offset the greater strength of other members of the same group. It has been held that where the greater strength of certain members is due merely to their superior business acumen or business efficiency, the legislature may not impose special burdens upon them;[4] but where their strength arises out of some unique form of business organization,[5] or some unique mode of advertising,[6] statutes imposing heavier taxes upon them

1. N. Y. CONS. LAWS (Cahill, Supp. 1934) c. 1, § 258-q.

2. Borden's Farm Products Co. v. Baldwin, 7 F. Supp. 352 (S. D. N. Y. 1934).

3. The court purported to rest its decision on the ground that the purpose of the discrimination was to prevent the economic destruction of the "independents", with a consequent concentration of all the business in the hands of a few large dealers, who might then, by secret agreement, form a monopoly. The "monopoly" part of the argument appears, however, to be merely an excuse, rather than a reason, for the result reached. The court stated that well-advertised brands of milk, although of the same grade and quality as the unadvertised brands, must be regarded as a different class of product, because the public believes that it is of superior quality and is ready and willing to pay a correspondingly higher price for it—thus revealing its desire to protect the "independents" quite apart from any desire to guard against monopoly. 7 F. Supp. 352, at 354 (S. D. N. Y. 1934).

4. Cotting v. Kansas City Stockyards Co., 183 U. S. 79 (1901) (where a tax was to apply to only those stockyards whose annual business exceeded a stated amount).

5. State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931); see Liggett Co. v. Lee, 288 U. S. 517 (1933) (in both of which a heavier tax was laid on "chain" stores than on other stores).

6. Rast v. Van Deman & Lewis Co., 240 U. S. 342 (1916); Tanner v. Little, 240 U. S. 369 (1916) (in both of which a tax was laid on those merchants who advertised by giving to customers coupons or trading stamps with each purchase, which were redeemable in cash or in merchandise).

are valid. In the instant case, the economic strength of the well-advertised dealers is not due to their superior business acumen or efficiency, but to their ability to advertise on a large scale over a fairly long period of time; and the ability to do this is, in turn, made possible by the accumulation of sufficient capital to finance such an advertising program. Whether the legislature should be permitted to curtail the power to destroy competition by price-cutting, where the source of the power is the accumulation of large amounts of capital, directly brings into play the issue of "paternalism" versus "rugged individualism". The language of the instant case suggests a preference for the latter.[7] But a recognition of the legislature's power to enact even non-discriminatory price legislation necessarily involves a recognition of its power to strike at the power to destroy competition by price-cutting. And since the Court has recently, in *Nebbia v. New York*,[8] upheld the validity of such legislation, the language in the instant case appears to conflict with the principles underlying that decision.

CONSTITUTIONAL LAW—RIGHT OF LAND GRANT COLLEGE TO EXPEL CONSCIENTIOUS OBJECTORS FOR REFUSAL TO TAKE COURSE IN MILITARY TRAINING AS REQUIRED BY STATE STATUTE—The Morrill Act [1] granted land to the states, the proceeds of which grants were to be used for establishing colleges in which military tactics must be taught. A local statute [2] established the University of California, provided that any resident of California should have the right to enter the university, and required every student to study military tactics. Appellants, students in the university having religious scruples against military training, were expelled solely for refusing to study military tactics. The university affords education such as cannot be had elsewhere in California except at greater cost, which appellants were unable to pay. Appeal to the Supreme Court was taken from a judgment of the California Supreme Court denying appellants' reinstatement, on the ground that this violated the "privileges and immunities" [3] and "due process" [4] clauses of the Constitution, and was a denial of the guarantee of religious freedom.[5] *Held*, that the judgment be affirmed. *Hamilton v. Regents of the University of California*, 55 Sup. Ct. 197 (1934).

The general power of a state to prescribe the terms under which state education shall be offered is well recognized.[6] Under this principle, a recent

7. At p. 189, the Court expressed a fear that the statute would deprive dealers in well-advertised brands of the advantages of advertising which, it says, is not only lawful, but has generally been commended and fostered. However, since the statute would not prevent such dealers from taking advantage of their well-advertised names by selling milk of a given grade at a higher price than would be possible if it were not well-advertised, it does not deprive them of all the benefits of advertising, but merely of the power to use it for the purpose of destroying competitors by price-cutting.

8. 201 U. S. 502 (1934).

1. 12 STAT. 503 (1862), 7 U. S. C. A. §§ 301-308 (1927)

2. Cal. Stat. 1867-1868, c. 244.

3. U. S. CONST. Amend. XIV.

4. U. S. CONST. Amend. XIV.

5. U. S. CONST. Amend. I.

6. Waugh v. University of Mississippi, 237 U. S. 589 (1915) (statute prohibiting fraternities in state schools); for a discussion of this case in the lower court see (1913) 62 U. OF PA. L. REV. 143; North v. University of Illinois, 137 Ill. 296, 27 N. E. 54 (1891) (requirement of state college compelling all students to attend chapel); Scopes v. State, 154 Tenn. 105, 289 S. W. 363 (1927) (statute prohibiting teaching of evolution in public schools); see Turck, *State Control of Public School Curriculum* (1927) 15 KY. L. J. 277.

Maryland decision[7] determined that conscientious objectors may be expelled from a land grant college solely for refusal to study military tactics. However, the state's power is subject to the limitation that its exercise must not be unreasonable,[8] nor in contravention of constitutional rights,[9] nor discriminatory.[10] The customary exemption of Quakers from the study of military training in land grant colleges does not constitute discrimination, since such exemption is not a constitutional right, and in the absence of a statutory provision, could not be legally enforced.[11] In the instant case, appellants sought education at the public's expense, and were not compelled to do so. Their privilege to attend a state-supported college was not an absolute one guaranteed by the Constitution, but was conditional upon compliance with regulations imposed by the state.[12] Moreover, it is well settled that religious freedom does not transcend a paramount interest of society. When public authorities enact a law which they deem necessary for the welfare of the people, no religious sect may claim exemption by reason of its religious differences alone.[13] The decision rests on sound legal logic. Since resort to the courts is now finally precluded, the remaining remedy is amendment of state statutes such as the one here involved, so as to make military training optional rather than compulsory.[14]

7. University of Maryland v. Coale, 165 Md. 224, 167 Atl. 54 (1933), *appeal dismissed sub nom.* Coale v. Pearson, 290 U. S. 597 (1933). The persuasiveness of the Coale case as authority is somewhat lessened by the following quotation from the opinion (at 236, 167 Atl. at 59): "The facts disclosed by the record seriously if not successfully assail the sincerity of Ennis Coale in his assertion that in refusing to take the prescribed military training he was actuated by conscientious religious convictions."

8. Meyer v. Nebraska, 262 U. S. 390 (1923) (statute forbidding teaching of foreign languages); Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 Pac. 49 (1921) (expulsion from public school for refusal to take dancing); State *ex rel.* Kelley v. Ferguson, 95 Neb. 63, 144 N. W. 1039 (1914) (expulsion from public school for refusal to take domestic science); see JOHNSON, CHURCH-STATE RELATIONSHIPS (1934) 173-178.

9. Meyer v. Nebraska, 262 U. S. 390 (1923) (statute forbidding teaching of foreign languages); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (statute requiring all children to be sent to public school); JOHNSON, CHURCH-STATE RELATIONSHIPS (1934) 179-182; *cf.* Miami Military Institute v. Leff, 129 Misc. 481, 220 N. Y. Supp. 799 (Buffalo City Ct. 1926) (requirement of private college that student attend church not of his denomination).

10. See Ward v. Flood, 48 Cal. 36, 56 (1874) (statute requiring separate public schools for colored children); State *ex rel.* Weaver v. Ohio State University, 126 Ohio St. 290, 297, 185 N. E. 196, 199 (1933) (state college requirement that colored students reside in separate quarters).

11. University of Md. v. Coale, 165 Md. 224, 167 Atl. 54 (1933); FREUND, POLICE POWER (1904) 501. The doctrine that exemption of conscientious objectors is not a constitutional right arose in cases denying naturalization to those who refused to agree to bear arms in case of war. United States v. Schwimmer, 279 U. S. 644 (1929); United States v. MacIntosh, 283 U. S. 605 (1931); Note (1929) 3 U. OF CIN. L. REV. 462.

12. *Cf.* Waugh v. University of Miss., 237 U. S. 589 (1915) (statute prohibiting fraternities in state schools).

13. Reynolds v. United States, 98 U. S. 145 (1878) (Mormons not exempt from statute punishing polygamy); Silverberg Bros. v. Douglass, 62 Misc. 340, 114 N. Y. Supp. 824 (Sup. Ct. 1909) (Jews not exempt from Sunday laws); Ferreter v. Tyler, 48 Vt. 444 (1876) (Catholic children not excused from attending public school on Catholic holy day); FREUND, POLICE POWER (1904) 500.

14. In 1923 Wisconsin passed an amendment providing that the military training course in its land grant college shall be elective. WIS. STAT. (1931) § 36.15. Minnesota followed suit in 1933. The action proceeded upon the belief that the Morrill Act, 12 STAT. 503 (1862), 7 U. S. C. A. §§ 301-308 (1927), only requires a land grant college to *offer* its students a course in military tactics, but not to *compel* them to take the course. 36 OPS. ATTY. GEN. (1930) 297; Colby, *Military Training in Land Grant Colleges* (1934) 23 GEO. L. J. 1. But see Johnson, *Military Training in Land Grant Colleges; is It Optional or Mandatory?* (1929) 24 ILL. L. REV. 271. No case has ever decided the issue, and the Court in the instant case expressly refused to do so.

CONTRACTS—OFFER AND ACCEPTANCE—PROVISION FOR PAYMENT OF INFORMER UNDER ESCHEAT STATUTE AS OFFER OF UNILATERAL CONTRACT—A statute provided that ". . . any person who shall first inform the Department of Revenue . . . that any escheat has occurred . . . and who shall procure necessary evidence to substantiate the fact of such escheat, and shall prosecute the right of the Commonwealth to the property escheated with effect, shall be entitled to one-quarter of the proceeds of the property . . ." [1] Plaintiff properly informed the secretary of revenue that an escheat had occurred. After plaintiff had acted in his capacity as informer for over two years, the secretary of revenue refused to recognize the plaintiff as informer.[2] *Held,* that the plaintiff's rights rested on contract and since the state had prevented complete performance, plaintiff could recover the statutory sum. *Miles v. Metzger,* 316 Pa. 211, 173 Atl. 285 (1934).

Whether rights arising under a statute providing for compensation for acts done in response thereto rest on contract depends on whether the legislature contemplated contractual relations.[3] There is some support for the proposition that the informer's right to compensation follows on a non-contractual basis in the analogy to cases holding it unnecessary that the claimant to a reward know of the existence of the offer at the time he apprehended a criminal, if the reward be offered by statute.[4] This doctrine, so clearly opposed to the fundamentals of contract law,[5] may be explained on the ground that courts feel that the entire contemplated benefit to society has been attained and that the claimant should not be defeated by rigid application of concepts.[6] But bounties given by statute for the killing of predatory beasts [7] and for enlistment in the army [8] are said to be contractual offers. There seems to be no reason for denying that the informer has an action proceeding on a contractual ground if it be remembered that the statute is designed to encourage the giving of information which might otherwise be withheld. Contract theory, which here better secures the informer by creating a legally protected interest, tends to promote the giving of the information and accords with the legislative intent. But since the statute calls for acts, rather than a promise, the offer is unilateral and, under orthodox contract law, revocable before complete performance.[9] The instant court treated the contract as bilateral upon the giving of the information, the other acts being conditions to the plaintiff's right to recover, and held that these conditions were excused by the state's prevention of performance.[10]

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1. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 1304.

2. A few days after the information had been given a will was probated appointing an executor and disposing of a small part of the estate. The secretary of revenue chose to take the property under an act providing a method for obtaining property in the hands of a fiduciary. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 1314.

3. Commonwealth *ex rel.* Henry v. Gregg, 1 Dauph. Co. 203 (Pa. 1894) held an analogous statute providing for informers' fees in escheated estates to be a contractual offer.

4. Auditor v. Ballard, 9 Bush 572 (Ky. 1873); Smith v. State of Nevada, 38 Nev. 477, 151 Pac. 512 (1915); see Board v. Davis, 162 Ind. 60, 69 N. E. 680 (1904).

5. Williams v. West Chicago St. R. R., 191 Ill. 610, 61 N. E. 456 (1901); RESTATEMENT, CONTRACTS (1932) § 53; ANSON, CONTRACTS (Corbin's ed. 1919) 29, 30, n. 1.

6. Auditor v. Ballard, 9 Bush 572 (Ky. 1873) at 575: "If the offer was made in good faith why should the state inquire whether appellee knew that it had been made. Would the benefit to the state be diminished . . .?" See Note (1916) 1 CORN. L. Q. 92.

7. Ingram v. Colgan, 106 Cal. 113, 38 Pac. 315 (1895).

8. Warren Borough v. Daum, 73 Pa. 433 (1873).

9. Alexander Hamilton Institute v. Jones, 234 Ill. App. 444 (1924); Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928). See Wormser, *The True Conception of Unilateral Contracts* (1916) 26 YALE L. J. 136; 1 WILLISTON, CONTRACTS (1920) § 60.

10. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 Pac. 966 (1903); Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472 (1912); 2 WILLISTON, CONTRACTS (1920)

Since, however, the acts were all directed to one end, this eminently fair result might more accurately have been attained by application of one of the various solutions of the problem of revocability of unilateral offers after partial performance by the offeree.[11]

PARTIES—PLAINTIFFS—SUBSTITUTION OF PLAINTIFFS UNDER DEATH STATUTE AFTER STATUTE OF LIMITATIONS HAS RUN—A Pennsylvania statute provides that for injuries resulting in death through defendant's negligence, if no action has been begun by decedent in his lifetime, the persons entitled to recover shall be "the husband, widow, children, or parents of the deceased, and no other relatives . . . ".[1] Moreover, the action must be brought within one year after the death.[2] Decedent was killed in Pennsylvania. His parents were the only beneficiaries within the statutory classes. The father alone brought suit in New York, although the mother should properly have been joined.[3] After the limitation period had run, the father died, and the mother moved to be substituted as plaintiff. *Held,* that denial of the motion was error. *Murray v. New York Ontario and Western R. R.,* N. Y. L. J., Nov. 19, 1934 (App. Div. 1st Dep't 1934).

An amendment to substitute or join a plaintiff after the statute of limitations has run will not be permitted where a new cause of action would be introduced or defendant would be materially prejudiced thereby.[4] Under the rule that matters of substance are governed by the *lex loci delicti,*[5] the court properly looked to the Pennsylvania statute and decisions in deciding the instant case. The precise question here presented—the substitution of one statutory beneficiary for another of the same class who has died after the limitation statute has run—has not been decided by Pennsylvania courts. It appears, however, that the right to recover pecuniary loss vests immediately upon the death complained of. Thus, where a beneficiary begins an action and dies after the one-year limitation period, such action survives to his personal representative for the joint benefit of his estate and of more remote classes within the statute,[6]

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§ 677; RESTATEMENT, CONTRACTS (1932) § 295. The last two authorities were cited by the court in those sections dealing with conditions which presuppose the existence of a valid bilateral contract.

11. Some suggested solutions are: (1) After the offeree has substantially performed the contract then takes on a bilateral character. Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902); (2) After partial performance the offeree is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered. RESTATEMENT, CONTRACTS (1932) § 45; (3) An implication in the offer of a subsidiary offer to keep the main offer open for a reasonable length of time, which subsidiary offer is accepted by beginning performance. McGovney, *Irrevocable Offers* (1914) 27 HARV. L. REV. 644.

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1. PA. STAT. ANN. (Purdon, 1931) tit. 12, § 1602. "And the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy . . ." *ibid.* See, also, § 1601.

2. *Id.* at § 1603.

3. Waltz v. Pennsylvania R. R., 216 Pa. 165, 65 Atl. 401 (1907); Holmes v. Pennsylvania R. R., 220 Pa. 189, 69 Atl. 597 (1908); see Davis v. Pennsylvania R. R., 34 Pa. Super. 388, 393 (1907).

4. Alessandrelli v. Arbogast, 209 Fed. 126 (M. D. Pa. 1913) (amendment from "widow" to "mother" of decedent); La Bar v. New York, *etc.,* R. R., 218 Pa. 261, 67 Atl. 413 (1907) (widow in her own right to widow as administratrix); Rabinovitz v. Keystone Coal & Coke Co., 3 West. Co. L. J. 183 (Pa. 1914) (administrator to father of decedent).

5. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 391-397.

6. Fitzgerald v. Edison Electric Illuminating Co., 207 Pa. 118, 56 Atl. 350 (1903); McArdle v. Pittsburg Rys., 41 Pa. Super. 162 (1909).

or for the sole benefit of his estate in absence of more remote statutory classes.[7] Moreover, it is not fatal for one parent alone to prosecute an action; an amendment of the record to add the other parent as plaintiff will be permitted after the statute has run, on the theory that no new cause of action is introduced,[8] and the amendment may even be made in the appellate court.[9] Or, if no objection is made at trial, a judgment for one parent alone might be upheld,[10] since, under the statute, the other parent will nevertheless share in distribution.[11] The propriety of the substitution as plaintiff of the father's personal representative could not have been questioned in the instant case.[12] And, as defendant will not be in the least prejudiced by the substitution of the mother, since the same defenses will be available as could have been urged against the father, and since the cause of action will remain the same, the decision of the court seems unquestionably correct—although a contrary result was reached by a federal court on almost identical facts.[13]

TAXATON—FEDERAL ESTATE TAX—EFFECT OF STATE LAWS ON FEDERAL TAX LAWS—A Rhode Island statute [1] permits contestants to a will to modify it by a compromise agreement and provides for the probate of the will as modified upon the approval of the Probate Court after a hearing in the presence of all those interested. Under this statute, contestants of a will effected a compromise providing in part for a charitable bequest not contained in the original will. The executor contended that the amount of the gift should be deducted from the "gross value" of the estate in computing the tax payable under the Act providing for the federal estate tax.[2] *Held,* that the gift is not deductible since it was not included in the original will of the testator. *N. W. Smith, Executor,* 31 B. T. A. No. 98 (1934).

In matters of descent, alienation and transfer of property, the federal courts have been disposed to follow local law.[3] But in order to obtain a somewhat uniform incidence of tax burden throughout the federal domain, the Su-

7. Haggerty v. Pittston Borough, 17 Pa. Super. 151 (1901).

8. Waltz v. Pennsylvania R. R., 216 Pa. 165, 65 Atl. 401 (1907); Holmes v. Pennsylvania R. R., 220 Pa. 189, 69 Atl. 597 (1908); Sontum v. Mahoning and Shenango Ry., 226 Pa. 230, 75 Atl. 189 (1910); *cf.* Huntingdon and Broad Top R. R. v. Decker, 84 Pa. 419 (1877).

9. Hughes v. Williams, 17 Pa. Super. 229 (1901).

10. But see Davis v. Pennsylvania R. R., 34 Pa. Super. 388, 393 (1907).

11. See this portion of the statute quoted *supra* note 1. For a discussion of the method in which statutory beneficiaries who are not parties will share in distribution, see McArdle v. Pittsburg Rys., 41 Pa. Super. 162, 166 (1909). A good discussion of the theory of pecuniary loss as the measure of damages appears in Gaydos v. Domabyl, 301 Pa. 523, 530, 152 Atl. 549, 552 (1930).

12. See cases cited *supra* notes 6 and 7.

13. Kluchnik v. Lehigh Valley Coal Co., 228 Fed. 880 (C. C. A. 2d, 1915). Indeed, this case would seem even stronger than the instant case in that there was no evidence there that the statute of limitations had run when the mother sought to be substituted. Although the court purported to be applying the Pennsylvania law in reaching its result, it seems clear that that law was misinterpreted—for, as appears from the cases cited in this note, the Pennsylvania law on this problem at that time was the same as it is now. An excellent annotation on the effect of the death of a beneficiary upon rights of action under a death statute appears in Note (1921) 13 A. L. R. 225.

1. GEN. LAWS, R. I. (1923) c. 363, § 18 *et seq.*

2. Revenue Act of 1926, 44 STAT. 9, 26 U. S. C. A. c. 20 (1926). The section under which the deduction was claimed is 44 STAT. 72 (1926), as amended, 26 U. S. C. A. § 1095 (Supp. 1933).

3. Warburton v. White, 176 U. S. 484 (1899); De Vaugn v. Hutchinson, 165 U. S. 566 (1896); Barton, *The Effect of State Laws on Federal Tax Laws* (1932) 10 TAX MAG. 11, 29.

preme Court has considerably limited the influence of local laws on federal taxing statutes unless the particular act expressly provides otherwise.[4] Congress, too, has sometimes minimized the effect of state variations by drafting the statutes to avoid the results of divergent legal theories.[5] Under the federal estate tax, this result has been obtained by interpreting the Act as imposing an excise on the interests of the testator which cease at his death, with deductions allowed for charitable bequests he makes, while the interests succeeded to by the beneficiaries are disregarded.[6] Therefore, since it is the death of the testator which generates the tax upon his estate, *i. e.,* the tax is imposed on the property he possessed *at his death,* deductible bequests must have the same generating source.[7] The language of the Rhode Island courts that the effect of the statute involved in the instant case is to "embody the compromise in the will . . . as if originally part of the will" [8] seems to endow charitable gifts contained in the compromise with the necessary quality for deduction. But the purpose of the statute itself would seem to negative this fiction in the present situation. The Act concerns the beneficiaries only and attempts merely to afford them the opportunity of avoiding the litigation incident to a will contest.[9] This justifies the inference that the compromise agreements sanctioned are intended to work not as a change in the testator's original intent, but as a settlement of the conflicting interests arising thereunder. Therefore, since the estate tax is imposed regardless of the interests of the beneficiaries, a situation like that in the instant case is clearly outside the purview of the statute.

TAXATION—INCOME TAX—TAXABILITY OF INCOME FROM IRREVOCABLE TRUST CREATED BY TAXPAYER FOR WIFE'S BENEFIT IN LIEU OF ALIMONY—Pursuant to an agreement—subsequently embodied in a divorce decree—entered into with wife during the pendency of a divorce action, husband created a trust fund, part of the annual income of which went to wife in lieu of alimony, dower, and her other statutory interests in his estate. *Held,* that husband is liable to income tax upon the income thus paid over to divorced wife because it directly benefited him by discharging a legal obligation he was bound to perform. *Wilcuts v. Douglas,* 73 F. (2d) 130 (C. C. A. 8th, 1934).

Husband agreed with wife that if she obtained a divorce and waived all claims against him for alimony, dower, support and maintenance, he would create a trust insuring her a designated income for life. Wife obtained a divorce which contained no provision for alimony, or other support, and husband set up the trust. *Held,* that he could not be taxed on the income going to divorced wife since he had parted with control over the trust fund and had made it impossible to regain control. *James H. Hyde,* 31 B. T. A. 57 (1934).

Federal income tax legislation and decisions reveal a constant watchfulness to curb attempts of taxpayers to avoid surtax brackets and yet retain the larger

4. Burnet v. Harmel, 287 U. S. 103 (1932); Poe v. Seaborn, 282 U. S. 101 (1930); see Fidelity-Phila. Trust Co. v. McCaughn, 34 F. (2d) 600, 602 (C. C. A. 3d, 1929); (1930) 79 U. OF PA. L. REV. 233.

5. See Note (1934) 34 COL. L. REV. 526, 527, in which these statutes are surveyed.

6. Y. M. C. A. v. Davis, 264 U. S. 47 (1923); Knowlton v. Moore, 178 U. S. 41 (1900).

7. See Mississippi Valley Trust Co. v. Commissioner, 72 F. (2d) 197, 199 (C. C. A. 8th, 1934); Wear v. Commissioner, 65 F. (2d) 665, 667 (C. C. A. 3d, 1933).

8. Barber v. Westcott, 21 R. I. 355, 43 Atl. 844 (1899).

9. Since the statute speaks of contestants only and provides the circumstances under which and the methods by which they may effect the compromise, the statement seems justifiable.

privileges of ownership.[1] This has been accomplished by an expansion of the concept of income [2] to include funds over which the taxpayer has "substantial" control [3] or from which he derives important benefits.[4] Thus, income received by an assignee under a contract of assignment may be taxed to the assignor.[5] Funds paid by one to relieve another's obligation have been held taxable to that other.[6] The settlor is taxable on the income of a trust revocable either by himself [7] or in conjunction with another,[8] and even though he is under a disability to revoke it during a particular tax year.[9] The Revenue Act taxes to the settlor the income of an irrevocable trust created to pay premiums of insurance on the settlor's life.[10] The *Douglas* case applied this new concept of income to irrevocable trusts in general.[11] Since income taxes have become the largest single source of revenue to the federal government, the result in all these situations is equally desirable. The *Hyde* case, opposed in result to the *Douglas* case,[12] confines itself too strictly to the letter of the Revenue Act which, with the exception of the aforementioned funded insurance trust, nowhere mentions taxability of a settlor on the income of an irrevocable trust.[13] The trust provisions of

1. "One can read in the revisions of the revenue acts the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." Cardozo, J., in Burnet v. Wells, 289 U. S. 670, 675 (1933).

2. Traditionally, the term has meant a gain or profit proceeding from the property and *received* or *drawn* by the taxpayer for his *separate* use, benefit and disposal. Eisner v. Macomber, 252 U. S. 189, 207 (1920). See also Note (1932) 45 HARV. L. REV. 1072.

3. ". . . taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed." Holmes, J., in Corliss v. Bowers, 281 U. S. 376, 378 (1930).

4. "Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the real owner, and to tax him on that basis." Cardozo, J., in Burnet v. Wells, 289 U. S. 670, 678 (1933).

5. Lucas v. Earl, 281 U. S. 111 (1930) (assignment of salary, current or future); Burnet v. Leininger, 285 U. S. 136 (1931) (assignment by partner); Ward v. Commissioner, 58 F. (2d) 757 (C. C. A. 9th, 1932) *cert. denied*, 287 U. S. 656 (1932) (assignment of rent); Rosenwald v. Commissioner, 33 F. (2d) 423 (C. C. A. 7th, 1929) *cert. denied*, 280 U. S. 599 (1929) (assignment of dividends). The concept has not extended to an assignment by a *cestui* of his right to receive trust income, since his right in the income producing trust is no broader than his right to receive the income. Commissioner v. Field, 42 F. (2d) 820 (C. C. A. 2d, 1930). For a complete discussion of the assignment cases see: Surrey, *Assignment of Income and Related Devices; Choice of Taxable Person* (1933) 33 COL. L. REV. 790.

6. Old Colony Trust Co. v. Commissioner, 279 U. S. 716 (1929); United States v. Boston & Maine Ry., 279 U. S. 732 (1929).

7. Corliss v. Bowers, 281 U. S. 376 (1930).

8. Reinecke v. Smith, 289 U. S. 172 (1933).

9. Dupont v. Commissioner, 289 U. S. 685 (1933). This case effectually overrules the decisions in Langley v. Commissioner, 61 F. (2d) 796 (C. C. A. 2d, 1932), and Lewis v. White, 56 F. (2d) 390 (D. Mass. 1932), as to which see (1933) 46 HARV. L. REV. 523; (1933) 81 U. OF PA. L. REV. 345.

10. § 167 (a) (3), Revenue Act of 1932, 45 STAT. 840, 26 U. S. C. A. § 2167. This section first appeared in § 219 (h) of the 1924 act, which section was held constitutional in Burnet v. Wells, 289 U. S. 670 (1933). For discussion and criticism of this case see (1933) 22 GEORGETOWN L. J. 114; (1933) 47 HARV. L. REV. 137; (1934) 28 ILL. L. REV. 704; (1933) 32 MICH. L. REV. 123.

11. Since the court concurred in the setting up of the trust, it is entirely possible that no tax avoidance motive was present in the particular case. However, the situation is a sufficiently common one to point the way to a fertile field for tax avoidance, unless the result of the Douglas case is made to obtain.

12. In both cases the trust income served to relieve the settlor of a marital obligation recognized in the Douglas case in the court's decree and the contract, and in the Hyde case in the contract alone.

13. The board referred to 45 STAT. 840 (1932), 26 U. S. C. A. § 2167, which purports to make taxable to the grantor the income of the revocable trusts and of the irrevocable insurance trusts mentioned in note 10 *supra*.

the Revenue Act, merely purporting to list those tax avoidance trust devices which have been called to the attention of Congress,[14] are preventive in nature, not exclusive. Consequently, the *Douglas* case seems commendable as another instance in which the court has blocked tax evasion by adopting a statutory construction more nearly following the intent of Congress in a situation provided for in only general terms.[15]

TRUSTS—LANDLORD AND TENANT—DEPOSIT UNDER A LEASEHOLD AGREEMENT AS A DEBT OR A TRUST—Pursuant to the terms of a leasehold agreement,[1] lessee deposited with lessor $15,000 as security for performance. The agreement provided that lessor was to keep the $15,000 in a separate saving fund account, to pay the lessee the interest received, and to exhibit to lessee the bank book showing a balance of $15,000. If lessor failed to show the book, lessee was not required to pay further rentals until the amount withheld equalled $15,000. Lessor made the saving fund deposit in his own name in defendant bank, which had extended loans to him before it had notice of plaintiff's interest in the deposit. After receiving notice the bank appropriated this deposit as security for the lessor's debt. Plaintiff, claiming under the lessee, sued the bank for the deposit. *Held,* that the leasehold deposit was a debt rather than a trust, and bank had the right to appropriate it. *Handle v. The Real Estate-Land Title & Trust Co.,* 316 Pa. 116, 173 Atl. 313 (1934).

Where the intention of the parties is not otherwise apparent, the courts have made the method of interest payment a determining factor in deciding whether a transaction created a debt or a trust. An agreement to pay stipulated interest indicates a debt,[2] while an agreement to pay whatever interest the money will earn indicates a trust.[3] In the instant case the agreement between

14. Referring to what later became § 219 (h) of the Revenue Act of 1924, the Report of the Committee on Ways and Means in the House of Representatives said, "Trusts have been used to evade taxes by means of provisions allowing the distribution of income to the grantor or its use for his benefit. The purpose of this subdivision of the bill is to stop this evasion." H. R. REP. No. 179, 68th Cong., 1st Sess., p. 21. *Cf.* note 1, *supra.*

15. For example, Old Colony Trust Co. v. Commissioner, 279 U. S. 732 (1929), cited note 6 *supra;* Lucas v. Earl, 281 U. S. 111 (1930), cited note 5 *supra;* Burnet v. Leininger, 285 U. S. 136 (1932), cited note 5 *supra.*

1. The following excerpts from the agreement contain the relevant portions of the lease:

"Lessee agrees to and does hereby deposit with Lessor the sum of Fifteen Thousand ($15,000) Dollars in cash, which Lessor agrees to deposit to his credit and keep in a separate saving fund account in a bank to be selected by him, and agrees to pay to Lessee the interest received on said account when and as received, which interest shall be the prevailing rate, and which sum shall be security for prompt and punctual payment of the rent, . . . Upon any default on part of Lessee, the Lessor shall be entitled to apply said sum or sums deposited hereunder or any part thereof, at the option of Lessor towards the payment of minimum rents. . . .

"Lessor agrees, prior to default by Lessee of terms herein, to exhibit to Lessee, or his agent, a Savings Fund Book showing deposit of $15,000 to credit of Lessor when minimum monthly rentals are paid and exhibition is then demanded and if at any such time Lessor is unable to do so, Lessee shall not be required to pay to Lessor further rentals reserved herein until amount withheld equals $15,000, when payments shall be resumed, . . ."

2. Old Colony Trust Co. v. Puritan Motors Corp., 244 Mass. 259, 138 N. E. 321 (1923); Pittsburg National Bank of Commerce v. McMurray, 98 Pa. 538 (1881); RESTATEMENT, TRUSTS (Tent. Draft, 1930) § 15, g; see (1909) 57 U. OF PA. L. REV. 273.

3. Allen v. Pollard, 109 Tex. 536, 212 S. W. 468 (1919); Keller v. Washington, 83 W. Va. 659, 98 S. E. 880 (1919).

the lessor and the lessee was to pay such interest as the money earned.[4] An even stronger indication that the parties intended a trust is contained in the provision that the fund was to be deposited and kept in a separate savings fund account.[5] This provision has a sensible meaning if the transaction created a trust, but has no reasonable purpose if it is construed as a debt.[6] Most of the leasehold deposit cases which have come before the courts have been held to create debtor-creditor relationships,[7] but obviously there is nothing peculiar to the leasehold deposit which should give rise to a presumption of a debt.[8] The court in the instant case apparently based its decision on the clause which stated that if the lessor did not exhibit savings fund book showing $15,000 balance, "Lessee *shall not be required* to pay to Lessor further rentals . . ." The court interpreted this clause to mean that lessee's *only* remedy was to withhold the rent,[9] and from this reasoned that lessor therefore could not be guilty of a conversion and so had the right to use the money unrestrictedly. It is submitted that this clause in the lease granted lessee a privilege, *i. e.*, that of withholding rent, and contained no words of limitation, restricting lessee to this course of action. It appears more likely that the purpose of this clause was to provide lessee with an easier means of ascertaining and proving a breach of trust duties by lessor and was not intended to grant to lessor the right to withdraw the money and use it for his own purposes. Moreover, the provision of the agreement that lessor should *keep* the $15,000 in a separate saving fund account seems clearly inconsistent with the idea that the lessor could use the money in any way he wished. The extent to which the court was in fact influenced by the bank's extension of credit in reliance[10] on this deposit is doubtful. The lessee's allowing the lessor to deposit the money in his own name was a representation that the lessor was the owner of the deposit and it may be that there would be an equitable estoppel in this case even had the court construed this as a trust.[11]

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4. ". . . and agrees to pay to Lessee the interest received on said account when and as received, which interest shall be the prevailing rate, . . ." The clause stating it shall be the prevailing rate makes the meaning of this passage slightly ambiguous. The purpose of this statement apparently is to require that the money be placed in a bank which is paying the prevailing rate on saving fund deposits. This clause modifies but does not change the previous statement that the lessor is to pay the interest received on said account when and as received.

5. United States v. Butterworth-Judson Corp., 267 U. S. 387 (1925); Matter of Atlas, 217 App. Div. 38, 216 N. Y. Supp. 490 (4th Dep't 1926); see Levinson v. Shapiro, 238 App. Div. 158, 160, 263 N. Y. Supp. 585, 587 (1st Dep't 1933).

6. The only possible reason, if the transaction created a debt, is that lessee thought he would have a better chance of getting his money back if it were kept intact in a separate account. However, as lessee's chance of getting his money back depends directly on lessor's solvency, it seems likely that the parties would have chosen a more adequate index of lessor's potential solvency if that had been their intention.

7. *In re* Banner, 149 Fed. 936 (S. D. N. Y. 1907); Mendelson-Silverman, Inc. v. Malco Trading Corp., 262 N. Y. 621, 188 N. E. 92 (1933); Levinson v. Shapiro, 238 App. Div. 158, 263 N. Y. Supp. 585 (1st Dep't 1933).

8. In fact if there were to be any presumption, it would seem to be to the contrary. The purpose of a leasehold deposit is to secure the payment of the rent, and the deposit is equally good security whether it is a debt or a trust. The interest of the lessee is that his deposit be returned to him, and generally speaking, a trust will be much safer than a debt. As a trust is as advantageous to both parties as a debt, and as it is more desirable for the lessee than a debt, it would seem that the parties would generally prefer a trust.

9. Instant case at 120.

10. The lower court found as a conclusion of law that the existence of the deposit at the time of the extension of the loans gave rise to a presumption that the bank relied on the deposit in extending the loans.

11. *Cf.* Goldberg v. Parker, 87 Conn. 99, 87 Atl. 555 (1913); Farmers Savings Bank v. Pugh, 204 Iowa 580, 215 N. W. 652 (1927); Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508 (1919); 46 L. R. A. (N. S.) 1097; RESTATEMENT, TRUSTS (Tent. Draft, 1933) § 304.